United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2191

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

No. 74-2191

P/S

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, Individually and on behalf of all similarly situated non-supervisory female employees of American Telephone and Telegraph Company, Long Lines Department,

Appellants,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

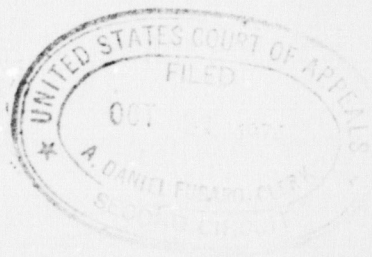
Appellee.

On Appeal from the United States

District Court for the

Southern District of New York

BRIEF FOR BELLAMY BLANK GOODMAN KELLY & STANLEY AS AMICUS CURIAE



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BRIEF FOR BELLAMY BLANK GOODMAN
KELLY & STANLEY
AS AMICUS CURIAE

ISSUE PRESENTED

Whether the District Court property relied upon Geduldig v. Aiello, 415 U.S. 973, 94 S.Ct. 2485 (1974), as authority for its dismissal, sua sponte, of a complaint wholly

based upon Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

The Facts

This is an action to redress the loss of civil rights to equal employment incurred by women employees at American Telephone and Telegraph Company, Long Lines Department ("Long Lines", or "AT&T").

The appellants in this case are Esther Skipper and her labor union, the Communication Workers of America, AFL-CIO ("CWA"), who are suing individually and on behalf of all similarly situated non-supervisory female employees of AT&T, Long Lines. The appellee Long Lines is a division of the American Telephone and Telegraph Company, the corporation which almost completely controls, through more than 20 subsidiaries, the telephone communications industry in this country. Not only is the Bell System the largest private employer worldwide, but without a doubt it employs more female workers than any other private company in the world.

AT&T, Long Lines maintains a policy of excluding benefits for absence due to disability arising from normal pregnancy and childbirth from its otherwise extensive employee benefits plan. This policy of exclusion is the basis for appellants' claim that Long Lines has violated the Civil Rights Act of 1964, 42 U.S.C. §2000-e et seq., as amended (Title VII).

The AT&T Long Lines disability plan at issue in

this case is indeed one of the most outstanding fringe benefits offered by the company to its employees. It covers every disability imaginable, with the single exception of disabilities related to normal pregnancy and childbirth. For example, it includes, in addition to ordinary disabilities, those which result from self-inflicted injuries or from an employee's commission, or attempt to commit, an assault or battery or felony. (Ex. 5 to O'Melveny Aff., Schawe Dep. p. 63.) Also covered are disability conditions unique to males, e.g., vasectomy. (Ex. 5 to O'Melveny Aff., Schawe Dep., p. 57.)

In addition to its outright denial of benefits to employees disabled as a result of normal pregnancy, the AT&T policy works to discriminate against pregnant employees on another level: it classifies absence due to normal pregnancy disability as a leave of absence -- i.e., "maternity leave" -- rather than as absence due to disability. Such a classification operates to the detriment of female employees in several important ways. One result is that a pregnant employee receives pension and service credits only for the first month of absence, and this restriction can have a significant negative impact on her seniority status. Her seniority status, of course, in turn affects her promotional opportunities, her vulnerability to lay-off, and the amount of money to which she is entitled as pension allowance and

disability benefits. Another consequence of AT&T's classification of absence due to pregnancy as maternity leave is that it forces its pregnant employees to pay the cost of remaining withint AT&T's Basic Medical Expense Plan during the period of absence, whereas employees disabled and absent for any other reason continue to have the costs for their coverage by this plan undertaken by AT&T. Finally, AT&T's discriminatory classification operates to deny disability payments to a woman who is absent from work due to pregnancy and who suffers a disability which is wholly unrelated to pregnancy while absent. Thus, whereas AT&T would refuse payments to a woman disabled in a car accident two days after going on maternity leave, an employee absent due to any other disability would receive payments for the new disability as well.

The Proceedings Below

This action was begun by service of the summons and complaint on AT&T, Long Lines by the appellants herein, alleging that AT&T's practices discriminate against appellants on the basis of sex, in violation of Title VII. AT&T answered by denying such discrimination and including a counterclaim against CWA on the basis of the collective bargaining relationship and the agreements made between CWA and AT&T Long Lines. CWA's reply denied these allegations and

asserted a jurisdictional defense.

The action was in the discovery stage when the District Court, upon learning of the United States Supreme Court's decision in Geduldig v. Aiello, 415 U.S. 973, 94 S.Ct. 2485 (June 17, 1974), announced that it would consider argument on whether, in light of Aiello, the complaint in the instant case should be dismissed. Thereafter, the District Court, per Judge Knapp, dismissed the complaint, with leave to replead invidious discrimination, in an opinion reported at 8 FEP Cases 830 (July 30, 1974). In so dismissing the case, however, the Court has certified for appeal the question of whether Aiello has established that the disparity between the treatment of pregnancy-related and other disabilities constitues sex-based discrimination proscribed by either Title VII or the Fourteenth Amendment.

STATEMENT OF INTEREST

BELLAMY BLANK GOODMAN KELLY & STANLEY is a feminist law firm created in 1973 in New York City. It was founded in part to provide women with a source of competent general legal services and to create a role model for women to initiate their own professional and business enterprises. But in addition, one of the express purposes of the firm -- an outgrowth of the feminist commitment of its founders -- was to meet the growing need to challenge through the legal

system those practices and policies which discriminate against women in our society. To help fulfill its purposes, the firm has received a foundation grant for special test-case litigation in certain areas where sex-based discrimination has harmed the civil rights of large numbers of women.

The policy at issue in this case is precisely the kind of discriminatory policy which this firm was created to challenge: an employer's efforts to penalize its women workers by denying them disability benefits for the one disabling condition -- pregnancy -- which is unique to women. As a feminist firm, we are filing this brief as amicus curiae to assert our interest in and commitment to changing this policy for all women touched by it. Further we assert a personal interest, for this issue is of concern to us not only as feminist lawyers, but because we ourselves are working women whose lives are affected by such policies.

ARGUMENT

I. Does the Supreme Court's decision in Geduldig v. Aiello require dismissal of this action?

II. Do the objectives of the Civil Rights Act of 1964 compel this Court to find that AT&T's policies violate Title VII and reinforce the second-class status of women in the work force?

III. Is deference owed to the EEOC's administrative expertise on employment discrimination and its guildelines concerning pregnancy-related disabilites?

Summary of Argument

I. The Supreme Court's decision in Geduldig v. Aiello does not require dismissal of this action, since Title VII's prohibitions on sex discrimination are more stringent than those of the Fourteenth Amendment.

II. The objectives of the Civil Rights Act of 1964 compel this Court to find that AT&T's refusal to provide its female employees with pregnancy disability benefits violates Title VII and reinforces the second-class status of women in the work force.

III. Deference is owed to the EEOC's administrative expertise on employment discrimination and its guidelines concerning pregnancy-related disabilities.

POINT I

THE SUPREME COURT'S DECISION IN GEDULDIG V. AIELLO DOES NOT REQUIRE DISMISSAL OF THIS ACTION, SINCE TITLE VII'S PROHIBITIONS ON SEX DISCRIMINATION ARE MORE STRINGENT THAN THOSE OF THE FOURTEENTH AMENDMENT.

The District Court, in its sua sponte dismissal of the complaint in this action, relied on the Supreme Court's decision in Geduldig v. Aeillo, 415 U.S. 973, 94 S.Ct. 2485 (1974). The Court, per Judge Knapp, based his decision on his view that in Aiello the Supreme Court had found that the exclusion of pregnancy benefits from a state disability scheme was not sex discrimination under the Fourteenth Amendment. Therefore, Judge Knapp concluded, AT&T's exclusion of such benefits is not sex discrimination under Title VII.

At the outset, however, it should be noted that in Aiello, the Supreme Court did not find that California's

exclusion of pregnancy benefits was not sex discrimination. What the Court did find was that the exclusion of benefits was not discrimination of the kind involved in Reed v. Reed, 404 U.S. 71 (1971) and Frontiero v. Richardson, 411 U.S. 677 (1973) -- that is, of the kind which is sufficiently invidious to overcome the judicial deference which is normally accorded the judgments of a state legislature. The Supreme Court believed the policy in Aiello was permissible for two reasons. First, it noted that the policy did not exclude all women from benefits but only the sub-class of women who were pregnant. Second, the Court also noted the absence of an explicitly discriminatory motive. Specifically, the Court said:

> . . .[T]his case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. . .Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation. . .
>
> The lack of identity between the excluded disability gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.
>
> Geduldig v. Aiello, supra, 94 S.Ct. at 2488, n. 20.

We believe that the Supreme Court should have found the Aiello policy a violation of the Fourteenth Amendment. But

regardless of Fourteenth Amendment standards, which are not at issue here, the Supreme Court has found that, in the employment context, policies like those of AT&T do violate Title VII. First, under Title VII, the question of an employer's motive is legally irrelevant.

> . . .Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.
> Griggs v. Duke Power Co., 401 U.S. 424 (1971) at 432.

See, also, Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), at 355; Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974). Thus, under Title VII the courts have struck down a wide range of practices which, although apparently neutral on their face, are nonetheless discriminatory in operation. These practices have included departmental seniority systems,[1/] educational requirements,[2/] no-transfer rules[3/] and height and weight requirements for specific jobs.[4/] AT&T's practice in this action of excluding pregnancy-related

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1/ Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States, 416 F.2 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

2/ Griggs v. Duke Power, supra.

3/ Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

4/ Meadows v. Ford Motor Co., _____F.Supp._____, 5 FEP Cases 665 (W.D. Ky.1973).

disabilities from its disability benefits is similarly infirm under Title VII and the sex guidelines promulgated by the Equal Employment Opportunity Commission ("EEOC"). See Point III, infra.

Second, under Title VII, courts may find an employment practice discriminatory even though it affects only some, but not all, members of a protected class. For example, in the Griggs case, supra, the Supreme Court found that pre-employment tests and high school diploma requirements were unlawful because they operated to eliminate more black than white job applicants. The tests and requirements used by the employer in Griggs did not adversely affect or eliminate all minority applicants, since some did possess the requisite credentials. Nonetheless, the Court found the requirement discriminatory.

The same is true of numerous other "neutral" practices affecting part of a group or a sub-class: the courts have found such practices unlawful under Title VII. These practices have included height and weight requirements,[5/] no-garnishment rules,[6/] word-of-mouth recruitment practices,[7/] testing

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5/ Meadows v. Ford Motor Co., supra.

6/ Wallace v. Debron Corp., supra.

7/ Lea v. Cone Mills Corp., 301 F.Supp. 97 (M.D.N.C. 1969), affirmed in pertinent part, 438 F.2d 86 (4th Cir. 1971); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

requirements[8] and rules against hiring persons with arrest records.[9] In each of these cases the courts have found violations of Title VII, even though the rule affected only some members of the protected class. The test was not whether the policy eliminated all members of a minority group or all women, but whether it affected a disparate number.

The Supreme Court has directly addressed the question of whether discrimination against a sub-class of women is prohibited by Title VII. In Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971), a company argued that its refusal to hire women with pre-school aged children was not sex discrimination because its work force as a whole was predominantly female. The Court rejected this argument, holding that a rule which affected only some, but not all, female job applicants was nonetheless discriminatory.

As these cases demonstrate, the courts have found that a policy may amount to the kind of sex or race discrimination which violates Title VII if its effect is to injure large numbers of women or minorities, regardless of the employer's

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8/ Griggs v. Duke Power, supra; United States v. Georgia Power, supra.

9/ Gregory v. Litton Systems, Inc., 472 F.2d 637 (9th Cir. 1972).

good or bad intentions. The Act prohibits systems and policies which have a discriminatory impact, as well as individual instances of wrongdoing. As the Senate Committee on Labor and Public Welfare explained when it amended Title VII in 1970:

> Employment discrimination as viewed today is a. . .complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.*

The employment discrimination prohibited by Title VII, then, may be caused not only by deliberate acts of hostility or prejudice, but by policies which have the effect of placing women or minorities at a competitive disadvantage in the work force. As we will show below, the exclusion of pregnancy benefits from an employer-funded benefits scheme is just such a policy. Since it has an overwhelmingly discriminatory

*S. Rep. No. 91-1137, 91st Cong., 2d Sess. 15 (1970), at p. 5.

impact on women workers, it violates Title VII, regardless of how the Supreme Court viewed a similar exclusion, outside the employment context, in Aiello.

POINT II

THE OBJECTIVES OF THE CIVIL RIGHTS ACT OF 1964 COMPEL THIS COURT TO FIND THAT AT&T's REFUSAL TO PROVIDE ITS FEMALE EMPLOYEES WITH PREGNANCY DISABILITY BENEFITS VIOLATES TITLE VII AND REINFORCES THE SECOND-CLASS STATUS OF WOMEN IN THE WORK FORCE.

Title VII provides that employers may not discriminate on the basis of sex with regard to any of the "terms, conditions or privileges of employment. . ." 42 U.S.C. §2000e-2 (a)(1). One of these terms, conditions or privileges of employment is disability benefits coverage. The purpose of such benefits, of course, is to provide income protection for workers when they are temporarily disabled and unable to work. This is an employment benefit which is important to all workers, particularly in these times of rising costs and high inflation. And, it is an especially important benefit for women workers, who -- in today's labor market -- work, not as a luxury, but out of sheer economic necessity.* Nearly

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* See, Women's Bureau, U.S. Dept. of Labor, Why Women Work (rev. ed.) (1973). The same point is made with equal clarity in another government publication:

> ¶¶ Of the nearly 34 million women in the labor force in March 1973, nearly half were working because of pressing economic need. They were

two thirds of all women who work in this country do so because they must, to support themselves and their families.* Thus, the problem of continuous income in case of disability is especially acute for women, and particularly for women employed in the lower-paying, non-supervisory jobs, like those in the Long Lines Department.

Nonetheless, the one condition which AT&T has chosen to exclude from its disability program is the condition -- pregnancy -- which is unique to its female employees. Thus it deprives women of the kind of total income protection

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either single, widowed, divorced, or separated or had husbands whose incomes were less than $3,000 a year. Another 4.7 million had husbands with incomes between $3,000 and $7,000.

An income of $7,000 does not meet the criteria established by the Bureau of Labor Statistics for even a low standard of living for an urban family of four. Women's Bureau, U.S. Dept. of Labor, The Myth and the Reality (April 1974).

*In fact, the numbers of women as heads of households, and who are thus family breadwinners, have been increasing at a very rapid rate. The total grew as much during 1970-73, from 5.6 million to 6.6 million, as it did during the entire decade of the 1960's. Report of the Census Bureau, U.S. Dept. of Labor: "Female Family Heads, March 1973", p. 23, no. 50.

that it has made available to its male employees, In doing so it places women at a serious competitive and economic disadvantage with men.

In a larger context, this case presents the timeless problem of a powerless labor group being relegated to second-class economic status by an employer's policies. Our American history is replete with the efforts of various immigrant racial and ethnic groups to achieve decent wages and employment conditions. For many, those goals have been, in large measure, achieved. But some labor groups, including women, have been denied such achievement.

Not only are women being kept from reaching the traditional equal employment goals of an equal wage, but, as in the case at bar, they are being denied benefits which touch upon the unique dual role which women have -- that of child-bearer and that of worker. More than half a century ago, a company called Muller fought Oregon's efforts to put a limit on the number of working hours that an employer could demand of its female employees.* The Supreme Court rejected the employer's challenge, articulating its view

*Such "protective" legislation aimed only at women has largely been discredited today as a barrier to equal employment for women. Nevertheless, the operative principal -- exploitation of a labor group -- is as real today as then.

of the fundamental importance of woman's role in the task of procreation and survival of the human race. Muller v. Oregon, 208 U.S. 412 (1908). While the roseate image of women-at-the-hearth evoked by the Court has long faded, and women now work in both worlds -- the home and the office -- the message still remains. Like Muller, AT&T in this case is exploiting working women -- denying them full employment benefits while imposing upon them the full burdens of employment. As in Muller, AT&T's attempt to penalize the working woman, who bears the dual burden of childbirth and employment, should be soundly rejected.

In discriminating against women in this fashion, AT&T and other employers like it injure the very class of workers who are already the most victimized by industrial exploitation. Working women stand at the very bottom of the economic ladder. In the Bell System, for example, 80% of all female workers earn less than $7,000 annually, whereas only 3% of females are in jobs earning them a yearly salary of $13,000 or more.* Moreover, throughout the nation, the

*Copus, et al., Study by EEOC Task Force, 118 Congr. Rec. 1243, 1248 (Feb. 17, 1972).

earnings gap between men and women is widening rather than decreasing,* and the median income for families headed by women, who are the sole breadwinners of those families, has been decreasing since 1969.** Penalizing women even further by depriving them of disability benefits compounds an already intolerable economic inequality.

Moreover, this is an inequity which can be rectified without placing any additional burden on other AT&T employees. Here the company pays the entire cost of the disability plan. This is in stark contrast to the situation in Aiello, where it was feared that, since the disability plan there was funded through employee contributions, its very lowest paid men and women workers would suffer too greatly if they were forced to contribute a greater percentage of their already meager wages. Since it is the company which provides the benefits in this case, other employees would not be burdened if AT&T were compelled to change its discriminatory policies.

In sum, AT&T's pregnancy exclusion deprives women workers of the kind of total income protection available to

*In 1955, the average full-time year-round woman worker earned 63.9 percent as much as the average man. In 1970, she earned 59.4 percent as much. Women's Bureau, U.S. Dept. of Labor, Fact Sheet on the Earnings Gap, (1973).

**Report of the Census Bureau, U.S. Dept. of Labor: "Female Family Heads; March 1973", p. 23, no. 50.

male employees. As long as the human species continues to propagate itself, women will continue to become pregnant. Denying benefits for whatever period of actual disability may result from that condition, while providing benefits to all other workers for every other condition, creates an artificial barrier which prevents women from attaining true equality in the work force. Griggs, supra, at 424. As such, it is precisely the kind of social evil which Title VII was enacted to prevent.

POINT III

DEFERENCE IS OWED TO THE EEOC'S ADMINISTRATIVE EXPERTISE ON EMPLOYMENT DISCRIMINATION AND ITS GUIDELINES CONCERNING PREGNANCY-RELATED DISABILITIES.

Not only is the employment policy challenged here prohibited by the general statutory provision of Title VII, but in addition, it is specifically proscribed by the EEOC's guideline, "Employment Policies Relating to Pregnancy and Childbirth", 29 C.F.R. §1604.10. The guideline reads, in pertinent part, as follows:

> . . .
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-realted purposes, temporary disabilities and should be treated as

> such under any health or temporary disability insurance or sick leave plan available in connection with employment.

This guideline is to be accorded judicial deference. It is a well-established rule that the interpretations and expertise of a governmental agency to whom Congress delegates the administration and enforcement of a federal statute are to be given great deference by the courts. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3d Cir. 1973); Wetzel v. Liberty Mutual Insurance Co., 7 FEP Cases 271 (W.D. Pa. 1974); Dessenberg v. American Metal Forming Co., 8 FEP Cases 290 (N.D. Oh. 1973). Indeed, in both Wetzel and Dessenberg, supra, the courts upheld the precise EEOC guidelines here at issue. In both cases the defendants were found to have violated Title VII for excluding pregnancy-related disabilities from their disability insurance.

Moreover, the corollary principle is clear: the agency's interpretation is to be put aside by a court only in narrow circumstances, such as where the legislative history of the statute and that interpretation are inconsistent or contrary. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). Here, there is no such inconsistency: the EEOC was given the broad mandate in the statute to develop guidelines spelling out

which conduct amounted to discrimination, and nothing in the legislative history of Title VII is inconsistent with or contrary to 29 C.F.R. §1604.10. In fact, courts have recognized that Congress intended a broad interpretation of what constitutes discriminatory conduct under Title VII:

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameters of such nefarious activities. Rather, it pursued the path of wisdom, being unrestrictive, knowing that constant change is the order or our day and that seemingly reasonable practices of the present can easily become the injustices of tomorrow.
>
> Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

The EEOC was initially established to enforce and administer the federal policy of non-discrimination embodied in the Civil Rights Act of 1964, including Title VII. Since its inception the EEOC has continuously and forthrightly examined and refined its perceptions and interpretations of what conduct constitutes discrimination, and the agency has developed guidelines, including the sex guidelines here at issue, to let employers and employees know what conduct was expected and what was prohibited in the terms of employment.

When it became apparent to the agency that pregnancy and childbearing were critical areas in which employers practiced pervasive discrimination against women, in limiting

their benefits and opportunities, the EEOC spent a substantial period of time and study examining such employer practices and ultimately promulgated its sex guidelines. Indeed, it was after the EEOC's extensive study of the impact of AT&T's maternity and pregnancy policies* that the agency adopted its guideline, 29 C.F.R. §1604.10. Thus, it is particularly due considerable deference in this action.

The fact that this guideline was enacted some time after passage of Title VII in no way diminishes its legal weight. In Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), cert. denied sub nom, Drewrys U.S.A. Inc., v. Bartmess, 404 U.S. 939 (1971), the court found irrelevant the tardiness of the EEOC's issuance of a sex guideline regarding differential treatment in retirement programs. In fact the Court held that the delayed formulation of any guideline does not abrogate any rights already enforceable under the Act. And numerous agency decisions prior to 1972** attest to the fact that the EEOC viewed an employer's disparate

*Copus, et al., Study by EEOC Task Force, 118 Congr. Rec. 1243, et seq. (Feb. 17, 1972).

**See, e.g., EEOC Decision No. 70-495, 2 FEP Cases 499 (1970); EEOC Decision No. 71-413, 3 FEP Cases 233 (1970); EEOC Decision No. 71-562, 3 FEP Cases 233 (1970); EEOC Decision No. 71-1474, CCH EEOC Decisions ¶6621, p. 4383, (1971).

treatment of pregnancy for purposes of employment benefits as discrimination proscribed by the Title VII, long before the guideline was formally issued. Thus, there can be no doubt that deference to EEOC's administrative expertise is proper in this action.

CONCLUSION

For the foregoing reasons, the District Court should be reversed in its sua sponte dismissal of the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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